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No. 01-1090

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT F. CARLSON AND JOHN MORACK,

Petitioners,

v.

UNITED ACADEMICS – AAUP/AFT, AFL-CIO,

Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

11 March 2002

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ARGUMENT

Respondent United Academics-AAUP/AFT, AFL-CIO's ("United Academics") Brief in Opposition ("Opp."), page 4, does not dispute that the Ninth Circuit's decision, Appendix ("App.") A at 1a-16a, creates conflicts among the Circuits on the important questions presented by Petitioners ("the professors"). Instead, United Academics sows confusion by ignoring the decision below and arguing the merits of the case, and by misrepresenting the case's adjudicated facts (*i.e.*, the contents of its notice and procedures).

I. The Court Should Grant *Certiorari* on the First Question Presented Because the Ninth Circuit's Decision Conflicts with All Existing Law on the Issue.

The Ninth Circuit affirmed the denial of class certification upon the District Court's "judgment for the Union [*sic*] on the merits," concluding that "class certification would serve no purpose." App. A at 16a. The Ninth Circuit erred in its premise and defied this Court's decisionmaking and that of other Circuits in its conclusion. Petition ("Pet.") at 11-16. Rather than addressing the decision below, United Academics ignores and justifies it on other grounds.

United Academics' argument, Opp. at 3 (the "question[] presented by the Petitioners [is]...whether class certification should be denied"), does not bear upon the important first question presented. *Compare* Pet. at i ("Would class certification 'serve no purpose' in a civil rights suit when a district court has awarded declaratory and injunctive relief, and nominal damages, to the named plaintiffs, but not to the members of the class plaintiffs seek to represent?"). While it explains the Ninth Circuit's standard of review, Opp. at 4-5, United Academics fails

to notice that the court did "not consider whether the district court abused its discretion in denying Appellants' motion for class certification." App. A at 16a (emphasis added). Whether the District Court "abused its discretion" in denying class certification is of no moment to the important first question presented in the Petition, *i.e.*, whether an appeals court may refuse to review a class certification denial by ignoring the favorable judgment entered for plaintiffs and erroneously assuming that judgment was entered for the defendant. Pet. at i, Question I.

Moreover, the accusation that "Petitioners try to bootstrap class certification to their mootness argument," Opp. at 5, obfuscates that the Ninth Circuit's decision below applies mootness reasoning while failing to label it as such. App. A at 16a; 265 F.3d at 787.[1]

United Academics' Opposition inserts into the decisions below holdings and principles never enunciated therein, divining significance in the differences between the responses of absent class members and the named professors to two initial and identical constitutionally inadequate demands. However, the District Court's class certification decision, App. B at 17a-27a, does not make reference to how each professor's response was

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[1] United Academics complains of the professors' use of the phrase "absent class members," claiming that "There are no[ne]," because "[n]o class was ever certified." Opp. at 4. A putative class certainly exists (and hence, there are absent class members), because denial of class certification was premised solely upon determination that the named professors failed the typicality and adequacy of representation prongs of Rule 23(a)(3) and (4), FED. R. CIV. P., because of their pursuit of punitive damages. App. B at 22a-27a. The District Court thus recognized the existence of a class of "potential objectors," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986), while denying that the named plaintiffs could represent it.

relevant to determination of the typicality of the claims raised by the named professors. United Academics cites only the District Court's summary judgment decision, App. C at 36a n.3, in an inapposite reference to why the claim for equitable restitution raised in the Complaint, Record ("R.") 1, was moot.

United Academics casts *Mitchell v. Los Angeles Unified School District*, 963 F.3d 258 (9TH CIR. 1992), Opp. at 8-11, in a manner further demonstrating divisions among the Circuits justifying review by this Court. According to United Academics, *Mitchell*'s "principle," Opp. at 9 (apparently that "employees who fail to object individually to the amount of the compulsory union dues have no right to receive relief from the payment of those dues," *id.*, *citing* 963 F.2d at 260) means that no class can be certified unless it consists only of objectors, even where (as here) the claim challenges a union's notice and procedures as not satisfying *Hudson*'s requirements.

This casting of *Mitchell* defies two other circuits' decisions. The Sixth Circuit in *Lowary v. Lexington Local Board of Education*, 903 F.2d 422, 428-30 (6TH CIR. 1991), held that a nonmember need not object under a constitutionally-inadequate *Hudson* notice and procedures in order to be entitled to relief when attacking the notice and procedures. *Mitchell*, as cast by United Academics, even more directly conflicts with *Abrams v. CWA*, 59 F.3d 1373, 1377-78 (D.C. CIR. 1995). There, the court reversed denial of class certification because whether an employee becomes an actual objector is irrelevant to right to relief as a "potential objector" in an action, like this, under *Hudson*. Three years after *Mitchell*, the District of Columbia Circuit belies United Academics' misrepresentation of it by unambiguously declaring that "no court has held that a class consisting of all agency shop employees may not be certified for the purpose" of challenging the adequacy

of a union's notice and procedures under *Hudson*. *Abrams*, 59 F.2d at 1378. As the court explained:

> Although an employee's dissent "is not to be presumed," *International Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961), this mandate does not control where the class seeks to vindicate its right to notice, directly affecting whether an employee will *become* an "affirmative dissenter." *Compare id.* (finding class inappropriate in suit for injunctive relief against political expenditures and for restitution because all members of proposed class had not "specifically objected to the exaction of dues for political purposes."); *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 119 (1963) (same). In misapplying the holdings in *Street* and *Allen*, the district court committed reversible error.

Id. at 1370 (other citations omitted).

Contrary to United Academics' misrepresentation, *Mitchell* did not address class certification. To be sure, *Mitchell* was certified as a class action. *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F. Supp. 938, 939-40 (C.D. CAL. 1990). Judgment was entered ordering relief to all class members for a union's and public employer's failure to comply with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310. *Mitchell* ordered restitution of all fees in excess of the nonchargeable portion of dues to all class members, and permanently enjoining seizure of monies in excess of the non-chargeable portion of dues from all nonmembers who—while never manifesting voluntary support for any of a union's activities—might not respond even to a constitutionally-adequate notice under *Hudson*. *Mitchell*, 744 F. Supp. at 944. But the appeal only challenged the permanent injunction. *Id.*, 963 F.2d at 260. Class certification was not an issue.

Thus, *Mitchell* merely reaffirms the proposition that an employee subject to a forced-unionism requirement must, after receiving adequate notice, object in order to avoid paying a fee equal to full union dues, *Allen*, 373 U.S. at 119. United Academics misrepresents *Mitchell* as having some bearing upon a nonmember's entitlement to relief in a case where, as here, a union fails to comply with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310. Opp. at 8-9. But *Hudson*'s pre-seizure notice protections apply to all "potential objectors," 475 U.S. at 306, while *Mitchell* addresses only what happens to "potential objectors" when they have the information necessary to determine whether to object, *i.e.*, when they must decide whether to become actual objectors.

Likewise, United Academics posits numerous self-serving and unproven assumptions about absent class members first alleged in opposition to the professors' class certification motion, and relied upon by the District Court.[2] However, these assump-

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[2] United Academics would have courts assume the existence of conflicts between the named plaintiffs and absent class members. There is good reason for this desire in terms of legal strategy, as it is settled Circuit law that existence of such conflicts must be proven by the theory's proponent. *Social Services Union Local 535 v. County of Santa Clara*, 609 F.2d 944, 948 (9TH CIR. 1979) (rejecting "purely speculative" theories about male union members in sex discrimination suit pursued by union on behalf of female employees); *cf. Lewis v. Curtis*, 671 F.2d 779, 788 (3D CIR. 1982) (burden is upon defendants to prove inadequacy of representation). United Academics offered not a scintilla of evidence to support its self-serving assertion. Absent class members wanting the relief sought submitted evidence of their support. *See, inter alia*, R. 18, Exhibit C at 40 & Exhibit D at 31-35 (professors' deposition testimony that no colleague criticized actions); Exhibit D, Attachments 4-6 (supportive e-mail correspondence to

(continued...)

tions were irrelevant to the Ninth Circuit's decision. App. B at 16a. None had any bearing on it, no matter their merit as questions to be considered by this Court.[3]

United Academics fails to address the important first question presented in the Petition. Perhaps this explains why the union does not dispute that judgment was entered for the professors, Pet. at 7-9, even though the sole basis for the Ninth Circuit's refusal to review the District Court's class certification decision was its errant notion that "the district court [entered] judgment for the Union on the merits." App. A at 16a.[4]

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[2] (...continued)
professors' counsel). And, of course, any professor desiring to "opt out" of the relief would retain the right to make voluntary (*i.e.*, absent of the union's threats and coercion) contributions to United Academics.

[3] The District Court relied upon a questionable line of cases mistakenly assuming that a charitable legal aid organization sought to represent absent class members, and the notion that named parties' zealous pursuit of all available relief (their duty under Rule 23) disqualifies them because of speculation that class conflicts might arise because some absent class members might not desire that relief. Those questions are for another day, as—rather than addressing them as presented to it—the Ninth Circuit relied only on its erroneous view of the District Court's judgment.

[4] Even if conflicts existed on a factual record absent here, review would be justified in light of decisions rejecting the District Court's notion that absent class members' opposition to the relief sought defeats class certification. *Horton v. Goose Creek Ind. Sch. Dist.*, 690 F.2d 470, 485-86 (5TH CIR. 1982) (dispute must go to litigation's subject matter); *see also White v. Local 942, LIUNA*, 90 F.R.D. 368, 371-72 (D. AK. 1981) (seeking vindication of statutory rights), *citing Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 n.4 (9TH CIR. 1978).

II. The Court Should Grant *Certiorari* Because a Constitutional Tortfeasor's Post-Suit Promises Are Insufficient to Moot a Case.

The lower courts' mootness rulings regarding the professors' request for declaratory and injunctive relief for each of the union's illegal post-filing demands upon them (App. A at 13a-15a) were premised solely upon faith in United Academics' compliance with *Hudson*, started only after it was sued. United Academics offers no reason why that determination does not conflict with this Court's jurisprudence, and is not in naked defiance of this Court's ruling in *Hudson*. 475 U.S. at 305 n.14. *See also United States v. Generix Drug Corp.*, 461 U.S. 453, 456 n.6 (1983) ("The possibility that [the litigant] may change its mind in the future is sufficient to preclude a finding of mootness"); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) ("[v]oluntary cessation of challenged conduct moots a case ... only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.' "); *see also Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)) ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' ").

Instead, United Academics offers a self-serving "wealth of evidence," Opp. at 13-14, of its actions subsequent to being sued and having its illegal actions called to the attention of the District Court. None of that "evidence," however, remotely restricts United Academics' freedom to "return to [its] old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The union couples this failure with reliance upon boilerplate. Opp. at 12-13. Thus, while this Court's decision in *County of Los Angeles v.*

Davis, 440 U.S. 625, 631 (1979), has bearing insofar as it states the general mootness rule, neither element of that test is met here. As demonstrated in Section III, *infra*, not all of the alleged violations have ceased. Moreover, there is no guarantee that those violations that have ceased will not recur, as United Academics remains the monopoly bargaining representative enforcing a forced-unionism requirement unencumbered by the requested declaratory and injunctive relief.

Moreover, as to absent class members, there is no "interim relief or event" that has "completely and irrevocably eradicated the effects of the alleged violation." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Under its threats and bluster, United Academics collected forced dues or agency fees from many absent class members.[5] Thus, its claim to have met the standards of *Davis* is baseless.

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[5] *Hudson* mandates "the constitutional requirements for the Union's collection of agency fees." 475 U.S. at 310. As that language is normally understood, when a union fails to comply with those requirements, it is not entitled to "collect[]" fees. That United Academics collected and retained fees from absent class members demonstrates that it did not "eradicate[] the effects" of its violation. Even under the Ninth Circuit's most-recently expressed view of the appropriate remedial scheme, the absent class members who paid full union dues are entitled to recover at least the nonchargeable portion of the fee. *Prescott v. County of El Dorado*, 177 F.3d 1102, 1109-10 (9TH CIR. 1999), *vacated*, 528 U.S. 1111 (2000), *reinstated in pertinent part*, 204 F.3d 984 (9TH CIR. 2000).

III. The Court Should Grant *Certiorari* Because Discriminatory Treatment Against Those Exercising Constitutional Rights Violates Both Circuit Law and This Court's Jurisprudence.

United Academics opposes the Petition's third question by misrepresenting its own policy, attempting to sow confusion and mask its practice. Opp. at 16-19. While the union denies that it exacts full union dues from nonmembers challenging its fee calculation, giving mere objectors an immediate advance reduction, the Ninth Circuit penetrated this smokescreen, recognizing that United Academics was doing what its notice plainly said. App. A at 11a ("it is true that challengers do not receive a rebate until the dispute is resolved by an impartial decisionmaker").[6] However, it found this practice acceptable under its prior decision in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1374 (9TH CIR. 1993). Thus, that portion of United Academics' argument denying the practice, Opp. at 16-17, misrepresents facts to this Court.

United Academics' Opposition argues that the professors should not prevail on the merits, therefore conceding the serious Circuit splits discussed in the Petition at 23-28. United Academics' argument here—like its argument regarding *Mitchell*—lends support to the professors' arguments, demonstrating how the decision below, App. A at 12a-13a, conflicts with the Ninth Circuit's own decisionmaking in *Grunwald*, where it held that the procedure adopted must "give[] the **objecting employee** the benefit of any imprecision in the calculation process." 994 F.2d

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[6] That the Ninth Circuit reversed the District Court's misundertanding of the union's procedures is why United Academics cites to only those portions of the Appendix containing the District Court's decision.

at 1374 n.3 (emphasis added). Permitting the impartial decisionmaker to increase the fee upon a nonmember's challenge clearly fails to meet this standard.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be ed, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
*Counsel of Record

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